Monfort, Inc., formerly known as Monfort of Colorado, Inc. *and* United Food and Commercial Workers, AFL–CIO, Local Union No. 7-R, a/k/a United Food and Commercial Workers, AFL–CIO, Local Union No. 7. Cases 27–CA–7742, 27–CA–8072, 27–CA–8316, 27–CA–8563, and 27–CA–8716

October 21, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The sole task for the Board in this proceeding is to modify its original remedy for mass hiring discrimination by the Respondent pursuant to the directions of the United States Court of Appeals for the Tenth Circuit.[1] The court has affirmed the Board's finding, inter alia, that the Respondent violated Section 8(a)(3) of the Act by its discriminatory application of facially neutral hiring criteria to disqualify former unionized employees who sought reemployment at the Respondent's reopened plant. The court disagreed only with that part of the Board's remedy for this violation which would have permitted the Respondent to prove in compliance proceedings that it would not have hired certain former employees if it had applied its neutral criteria in a nondiscriminatory manner.

The court held that the Respondent, having elected to litigate the issue of whether it would not have hired former employees as part of its *Wright Line* defense,[2] was precluded from relitigating this issue at the compliance phase. Furthermore, the court expressed the view that ''permitting [the Respondent] to relitigate at the compliance hearing whether it would have hired a particular former-employee applicant is simply unworkable in light of the unfair labor practices found in this case,''[3] where the Respondent's hiring decisions for new applicants (those other than former employees) were so ''largely subjective.''[4] The court then remanded the case with instructions to clarify the reinstatement and backpay remedy ''so as to preclude Monfort from relitigating issues that it chose to litigate at the proceeding on the merits.''[5]

Having accepted the court's remand, we regard its opinion as the law of the case. In our view, this means that the Respondent is precluded from proving in compliance that it would not have hired any former employee applicant either by a nondiscriminatory application of its hiring criteria *or* by a nondiscriminatory application of the more lenient, ''largely subjective'' criteria applied to new applicants. Pursuant to the court's instructions, we shall amend the Board's prior remedy.

SECOND AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(3) and (1) by applying facially neutral hiring criteria in a discriminatory manner to its former employees who submitted formal employment applications, we shall order the Respondent to offer all former employee applicants who would have been hired on or after March 1, 1982, employment in the positions for which they would have been hired but for the Respondent's unlawful discrimination or, if those positions no longer exist, to substantially equivalent positions, dismissing, if necessary, any and all persons hired to fill such positions. The Respondent shall also place on a preferential hiring list all remaining discriminatees who would have been hired but for the lack of available jobs. Furthermore, we shall order the Respondent to make whole all discriminatees for any loss of wages and other benefits suffered as a result of the unlawful failure to hire or delay in hiring them. Backpay for all discriminatees in this case shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent will not be permitted in compliance proceedings to rebut its reinstatement and backpay obligations by relitigating the issue whether it would not have hired the discriminatees by a nondiscriminatory application of its hiring criteria or the more lenient, largely subjective criteria applied to new employee applicants.

ORDER

The National Labor Relations Board orders that the Respondent, Monfort, Inc., formerly known as Montfort of Colorado, Inc., Greeley, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Board's original Order reported at 298 NLRB 73 (1990), as modified below.

1. Substitute the following for paragraph 2(b).

''(b) Offer Ruth De Vargas and those former employees whom it has unlawfully refused to rehire im-

[1] On April 6, 1990, the National Labor Relations Board issued its original Decision and Order in this proceeding. *Monfort of Colorado*, 298 NLRB 73. Subsequently, the Respondent and the Union filed petitions for review with the United States Court of Appeals for the 10th Circuit, and the Board filed a cross-application for enforcement of its Order. On April 27, 1992, the court enforced the Board's Order except as to portions of the reinstatement and backpay remedy discussed here, and it remanded the case to the Board to clarify the remedy. *Monfort, Inc. v. NLRB*, 965 F.2d 1538.

On July 16, 1992, the Board notified the parties that it had accepted the court's remand and invited the filing of statements of position. Thereafter, only the Union filed a statement of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] *Monfort, Inc. v. NLRB*, supra at 1547.

[4] Id.

[5] Id.

mediate and full reemployment in the positions for which they would have been hired but for the Respondent's unlawful discrimination or, if those positions no longer exist, to substantially equivalent positions at the Respondent's Greeley, Colorado plant, without the loss of their seniority or any other benefits, dismissing, if necessary, any and all persons hired to fill such positions; make each of them, as well as those former employees whom it has unlawfully delayed in rehiring, whole for any loss of earnings and other benefits resulting from the discrimination against them; and place on a preferential hiring list all remaining discriminatees who would have been hired but for the lack of available jobs in the manner set forth in the second amended remedy section of this decision.''

2. In 298 NLRB 73 the notice was inadvertently omitted from publication. We are adding the attached notice to reflect that omission.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

All our employees have the right to join United Food and Commercial Workers International Union, AFL–CIO, or any other labor organization, or to refrain from doing so.

WE WILL NOT threaten employees that, if United Food and Commercial Workers International, AFL–CIO, Local Union No. 7 wins a representation election, our Company would settle an unfair labor practice case, fire our present employees, and rehire our former employees.

WE WILL NOT tell employees that if the Union lost the representation election our Company would vigorously fight an unfair labor practice case, even if it took years to do so, before our Company would fire even one present employee in order to rehire a former employee.

WE WILL NOT threaten employees that the plant will be closed if the employees selected the Union to represent them.

WE WILL NOT threaten an employee by telling him that the employees' selection of the Union as their collective-bargaining representative will cause the Greeley plant to be closed again, and suggest to the employee in the same conversation that the employees should form their own organization to bargain with our Company instead of selecting the Union to represent them.

WE WILL NOT unlawfully interrogate employees concerning their union sympathies.

WE WILL NOT tell an employee that employees who voted for the Union were a bunch of troublemakers and ought to be fired.

WE WILL NOT threaten an employee that the employees would lose their profit-sharing benefits if the employees selected the Union as their collective-bargaining representative.

WE WILL NOT threaten an employee with retaliation for revealing statements made by a supervisor of our Company, which had resulted in the Union's filing of unfair labor practice charges against our Company.

WE WILL NOT tell an employee that an employee who would testify against our Company in an NLRB hearing ought to be shot or abandoned on some island.

WE WILL NOT promise an employee free work gloves if the employee votes against the Union.

WE WILL NOT tell an employee to solicit other company employees to sign a petition against the Union, in the context of telling the same employee that he will be sure to get a promotion to a leadman's job.

WE WILL NOT create the impression of surveillance by taking notes behind employees wearing union insignia.

WE WILL NOT disparately apply our work rules to permit employees to engage in antiunion activities in the plant while refusing to permit employees to engage in prounion activities.

WE WILL NOT fail to rehire or delay in rehiring, because of past union membership and activities, former employees of our Company after they have filed Monfort applications for employment concerning production jobs at our Company's Greeley plant.

WE WILL NOT refuse to rehire an employee because the Union has filed an unfair labor practice charge with the NLRB against our Company concerning our Company's termination of that employee.

WE WILL NOT unlawfully discharge any of our employees or discriminate against them in any manner because of their union affiliation or because they engage in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer James Little immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole with interest for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL offer to Ruth DeVargas and to all former employees who filed Monfort applications but were not rehired because of their past union membership and activities immediate and full reemployment in the positions for which they would have been hired but for the Respondent's unlawful discrimination or, if those positions no longer exist, to substantially equivalent positions at our Company's Greeley plant, without the loss of their seniority or any other benefits dating from the time we should have hired them, dismissing, if necessary, any and all persons hired to fill such positions, and WE WILL place on a preferential hiring list all remaining individuals who would have been hired but for the lack of available jobs.

WE WILL make whole Ruth DeVargas and each of those former employees whom we unlawfully failed to hire or delayed in rehiring for any loss of earnings and other benefits resulting from our discrimination against them, less any interim earnings, plus interest.

WE WILL remove from our Company's files any references to our unlawful discharge of James Little and to our unlawful failure to rehire Ruth DeVargas and the former employees mentioned above, and WE WILL notify each one of them in writing that this has been done, and that the past discharge or failure to rehire will not be used against them in any way.

WE WILL mail copies of this notice to all our employees and to the discriminatees mentioned above; WE WILL publish copies of this notice in local newspapers; and WE WILL read this notice to all our employees, or WE WILL permit an agent of the NLRB to read this notice to all our employees.

WE WILL, on request of the Union made within 1 year of the issuance of the Board's Decision, Order, and Direction of Second Election, make available to the Union without delay a list of names and addresses of all employees employed at the Greeley, Colorado plant at the time of the request.

WE WILL, immediately on request of the Union, for a period of 2 years from the date on which this notice is posted or until the Regional Director of the NLRB certifies the results of a fair and free election, whichever comes first, grant the Union and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted.

WE WILL, immediately on request of the Union, for a period of 2 years from the date on which this notice is posted or until the Regional Director certifies the results of a fair and free election, whichever comes first, permit a reasonable number of union representatives access for reasonable periods of time to our plant in nonwork areas during employees' nonworktime so that the Union may present its views on unionization to employees, orally and in writing.

WE WILL, for a period of 2 years from the date on which this notice is posted or until the Regional Director certifies the results of a fair and free election, whichever comes first, give the Union reasonable notice and give two union representatives a reasonable opportunity to be present if we gather together any group of our employees on worktime at our plant and speak to them on the question of union representation, and WE WILL, on request, give one of the Union's representatives equal time and facilities also to speak to you on the question of union representation.

WE WILL, in any election which the NLRB may schedule at our Greeley plant within 2 years of the posting of this notice and in which the Union is a participant, permit, on request by the Union, at least two union representatives access to the plant and appropriate facilities to speak to you for 30 minutes on working time. This speech will take place not more than 10 working days, but not less than 48 hours, prior to the election.

MONFORT OF COLORADO, INC.